



Legislative Bulletin.....October 16, 2007

Contents:

H.R. 2102— Free Flow of Information Act

Summary of the Bill Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: 0

Effect on Revenue: \$0

Total Change in Mandatory Spending: \$0

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: 0

Number of Bills Without Committee Reports: 0

Number of Reported Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

H.R. 2102 — Free Flow of Information Act of 2007 (*Boucher, D-VA*)

Order of Business: The bill is scheduled to be considered on Tuesday, October 16, subject to a structured rule (H.Res. 742) that allows for ten minutes of debate on one amendment. The rule would waive all points of order against considering the bill—except those for PAYGO and earmarks—and would waive all points of order against the bill itself—except that for earmarks. The rule would make in order one motion to recommit (with or without instructions).

Summary: H.R. 2102 would prohibit a federal entity from compelling a covered person (see below for definition) to testify or produce any document unless a court requires such. The bill outlines the reasons when this may be appropriate to do.

Section 2. H.R. 2102 establishes a procedure in which a federal entity may force the disclosure of confidential information from a journalist and specifies that a federal entity may not force a journalist to testify or provide documents that belong to the journalist (either obtained or created by them), unless the following conditions are met:

- The party seeking to produce the documents must exhaust “all reasonable alternative sources of the testimony or document.”
- If the documents are to be used in a criminal investigation or prosecution, documents may be required if there is “reasonable ground” to believe that a crime has occurred, if “the testimony or document sought is critical to the investigation or prosecution or to the defense against the prosecution.”
- If the documents are part of something other than a criminal investigation or prosecution (i.e. a civil investigation), the testimony or documents sought must be critical to the successful completion of the case.
- If the documents under consideration would reveal the identity of a source of information, or “include any information that could reasonably be expected to lead to the discovery of the identity of such a source”, documents can only be required disclosed if:
 - they would “prevent an act of terrorism against the United States or its allies or other significant and specified harm to national security with the objective to prevent such harm”;
 - the disclosure is necessary to prevent imminent death or significant bodily harm;
 - disclosure of the identity of such a source is necessary to identify a person who has disclosed a trade secret, actionable under section 1831 or 1832 of title 18, United States Code; individually identifiable health information, as such term is defined in section 1171(6) of the Social Security Act (42 U.S.C. 1320d(6)), actionable under Federal law; or nonpublic personal information, as such term is defined in section 509(4) of the Gramm-Leach-Bliley Act (15 U.S.C. 6809(4)), of any consumer actionable under Federal law.
- If the party seeking such documents can prove that the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.

H.R. 2102 places a limit on the content of the information, stating that it must not be “overbroad, unreasonable, or oppressive and, as appropriate, be limited to the purpose of verifying published information describing any surrounding circumstances relevant to the accuracy of such published information.” In addition, the information must be “narrowly tailored in subject matter and period of time covered so as to avoid compelling production of peripheral, nonessential, or speculative information.”

Section 3. This section sets the requirements in cases where the federal entity is attempting to retrieve information from a communication service provider (CSP) regarding a transaction between the CSP and the covered person. The limitations in section 2 of the bill apply to these documents as well. Section 3 clarifies that testimony or documents acquired from the CSP of a non-covered person are *not* protected.

This section also defines the procedures for the notice and hearing given to a covered person. According to this section, a court may compel testimony or disclosure of documents only after a “notice of the subpoena or other compulsory request for such testimony or disclosure from the CSP” is provided to the covered person, and after they have an opportunity to be heard before the court before the disclosure is compelled.

H.R. 2102 sets an exception to such notice if the “court involved determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation.”

Section 4. H.R. 2102 defines the following terms:

Communication Service Provider: “any person that transmits information of the customer's choosing by electronic means; and includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153, 230)).”

Covered Person: “a person who, for financial gain or livelihood, is engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person. Such term shall not include any person who is a foreign power or an agent of a foreign power, as such terms are defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801); or any organization designated by the Secretary of State as a foreign terrorist organization in accordance with section 219 of the Immigration and Nationality Act (8 U.S.C. 1189).”

Document: “writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.).”

Federal Entity: “an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or issue other compulsory process.”

Journalism: “the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.”

Amendment Information: The following amendment is debatable for 10 minutes.

Boucher (D-VA)/Pence (R-IN). This amendment would provide for the bill to not be applicable in order to prevent the identification of the perpetrator of a terrorist attack or harm to national security. In addition, it provides that, in cases involving leaks of properly classified information, the disclosure of the leaker’s identity may be compelled. The amendment permits law enforcement to obtain an order compelling the disclosure of documents and information obtained as the result of eyewitness observations of alleged criminal or tortious conduct. It specifies that for a person to be covered, they must “regularly” engage in the listed journalistic activities. The amendment further amends the definition of “covered person” by adding three new exceptions.

(1) Specially Designated Global Terrorist, as designated by the Treasury Department; (2) a specially designated terrorist, as defined by federal regulations; and (3) a terrorist organization, as defined by immigration law.

Additional Information:

One case has been ruled on journalists' privilege in the Supreme Court. In the case, *Branzburg v. Hayes*, a reporter was issued a subpoena to reveal source information before a grand jury in a criminal investigation. According to the ruling, the court decided that there was no constitutional or common law privilege for a reporter to shield the identity of sources from a grand jury, with one exception being that the First Amendment allows the privilege in a grand jury investigation conducted in the absence of good faith. However, the Court stated that "reporters, like any other citizens, [must] respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."

According to the House Judiciary Committee, "*In re: Grand Jury Subpoena* is the federal court of appeals decision that declined to overturn the finding of civil contempt against journalists Judith Miller and Matthew Cooper for refusing to produce subpoenaed evidence regarding the identity of CIA agent Valerie Plame. The Supreme Court declined to review the decision. As a result, Matthew Cooper agreed to testify but Judith Miller refused and spent time in prison on contempt charges. The court cited *Branzburg* and held that the First Amendment does not permit journalists to refuse to testify before a grand jury."

Currently, 49 states have adopted laws to provide a journalists' privilege. While all considerably different, each state law protects the identity of a reporter's confidential sources in some form.

Committee Action: H.R. 2102 was introduced on May 2, 2007 and referred to the Committee on Judiciary. On August 1, 2007, the Committee held a mark-up and reported the bill on September 10, 2007 as amended, by voice vote.

Department of Justice Position: In response to a request made by Judiciary Committee Ranking Member Lamar Smith, the DoJ summarized its oppositions as:

- "The bill makes it impossible to enforce certain criminal laws and impedes national security investigations;
- "The bill limits judicial authority to ensure the integrity of judicial proceedings;
- "The definition of "covered person" is excessively broad and could apply to terrorist organizations;
- "The bill provides greater protection for trade secrets than national security secrets;
- "The bill unconstitutionally transfers core Executive authority to the Judiciary."

The DoJ is urging Congress to oppose the passage of H.R. 2102, even after the passage of the manager's amendment.

Administration Position: An official statement of administration policy was unavailable at press time.

Possible Conservative Concerns: Some conservatives may be concerned about a federal definition of journalist and journalism that could render this legislation applicable to a much broader array of people than intended, especially after likely court review. In addition, since 1991, the DoJ reports that they have issued 19 subpoenas to reporters seeking confidential source information, and according to the House Judiciary Committee, the Reporters Committee for Freedom of the Press announced last fall that in the previous 20 years, 16 journalists have been jailed over privilege claims. Some conservatives may question the need for this legislation, which arguably may increase the difficulty in prosecuting those who leak classified information. For instance, Ranking Member of the House Judiciary Committee Lamar Smith, an RSC Member, is opposed to the bill and states the following concerns (according to information received by the House Judiciary Committee):

- “The Supreme Court ruled 35 years ago that the First Amendment does not shield journalists from testifying at grand jury proceedings. Since then, 100 federal reporter shield bills have been introduced. But the absence of a federal shield bill like H.R. 2102 hasn’t stopped the press from breaking major news stories – from Watergate to Iran-Contra to the Clinton scandals to Abu Ghraib prison;
- “DoJ has its own internal guidelines for dealing with reporters and source information. They are fair and administered flexibly and uniformly; they work. By contrast, H.R. 2102 imposes a mini-trial proceeding on the Department when it investigates crimes. The bill places a heavy evidentiary burden on DoJ to demonstrate a compelling need for a reporter’s source, which can be negated by the personal whims of hundreds of federal judges who will handle these cases;
- “The bill contains a limited number of examples where the privilege doesn’t apply, such as disclosures of trade secrets and personal health and financial records. But most of their crime fighting activities (efforts to combat child pornography or alien smuggling) are not addressed;
- “The bill is also flawed because the provision designed to combat terrorist activities is applied prospectively. Assuming it met other burdens, DoJ could obtain source information to prevent a terrorist attack; but it couldn’t acquire the same information to investigate an attack once it occurred;
- “DoJ and the Acting Director of National Intelligence formally oppose the bill. Other executive agencies feel the same way. The White House will issue a strong Statement of Administration Policy (SAP) against H.R. 2102.”

Some conservatives may also be concerned that there are exemptions for some types of secrets and not others.

Cost to Taxpayers: According to CBO, H.R. 2102 would have no significant impact on the federal budget.

Does the Bill Expand the Size and Scope of the Federal Government?: Yes. The bill would expand current law to set new standards and exceptions for the compelling of evidence and documents from covered sources, etc.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: According to the Committee Report (110-370), “In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2102 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.”

Constitutional Authority: The Judiciary Committee, in House Report 110-370, cites constitutional authority in Article I, Section 8, Clause 18 of the Constitution and the First Amendment. Article I, Section 8, Clause 18 states that Congress has the authority “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

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